THE SUPREME COURT'S ADJUDICATION OF CONSTITUTIONAL ISSUES IN 1921-1922[1]

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I. MISCELLANEOUS NATIONAL POWERS[2]

The power of Congress over the territories was involved in three cases. *Balzac v. Porto Rico*[3] held that Porto Rico has not been "incorporated" into the United States so as to make applicable the constitutional requirement of trial by jury in criminal cases. This had been substantially settled in some of the Insular Cases, leaving only the question whether the situation had since been changed. In holding that it had not, Chief Justice Taft placed chief reliance on the absence of any explicit declaration by Congress and on the fact that in the Organic Act of Porto Rico of March 2, 1917, chiefly relied on by the plaintiff in error, Congress had included a bill of rights embracing most of the guarantees of the federal Constitution with the exception of those securing the right of trial by jury. Since the extended discussion of the significance of "incorporation," the presumption against incorporation by implication was said to be very powerful and sufficient to rebut inferences that otherwise might be drawn from the legislation making Porto Ricans citizens of the United States, establishing territorial courts and extending numerous federal laws to Porto Rico. Weight was attached, too, to the fact that the civil law prevailing under Spanish rule had not made use of juries and that therefore it was likely that Congress deemed it best not to take action to force the jury system on the

[1] For reviews of Supreme Court decisions from 1914 to 1921, see 12 AM. POL. SCI. REV. 17-49, 427-457, 640-666; 13 *id.* 47-77, 229-250, 607-633; 14 *id.* 53-73; 19 MICH. L. REV. 1-34, 117-151, 283-323; and 20 *id.* 1-23, 135-172, 261-288, 381-406, 469-513. Decisions on the commerce clause from 1910 to 1914 are reviewed in 6 MINN. L. REV. 123, 194; 21 COLUM. L. REV. 737; and 22 *id.* 28, 133.

[2] Other national powers are considered in succeeding sections on commerce, taxation, and courts.

[3] 258 U. S. —, 42 Sup. Ct. 343 (1922). In 20 MICH. L. REV. 215 is a note on the application of the first eight amendments to unincorporated territories, with special reference to the Virgin Islands.

Porto Ricans, but to leave the matter in the discretion of the territorial legislature. The opinion of the chief justice discusses other phases of the "insular question" and is a valuable essay by one whose past experience has especially qualified him in the particular subject. Mr. Justice Holmes confined his concurrence to the result.

The fact that the Philippine Islands are still "unincorporated" into the United States necessarily underlies the decision in *Rafferty v. Smith, Bell & Co.*[4] giving effect to an Act of Congress of June 5, 1920, which ratified duties on exports from the Philippine Islands imposed between September 1, 1916, and September 30, 1917, under an act of the Philippine legislature of February 24, 1916, notwithstanding an Act of Congress of August 29, 1916 (the Autonomy Act), declaring that no export duties should be levied or collected on exports from the islands. Before the enactment of the validating Act of Congress the exporter had recovered judgment for the repayment of the duties in the supreme court of the islands, but this was held to give him no vested right not to have the judgment reversed on certiorari, under the authority of an earlier decision which also was adduced in support of the constitutional power of Congress to validate taxes invalid when levied. Mr. Justice McReynolds contents himself with bare recital and citation without elucidation of the issues involved. Mr. Justice Clarke confines his concurrence to the result. It is natural to infer that his objections relate to sins of omission rather than of commission.

Alaska, though an incorporated territory, was held in *Alaska v.* Troy[5] not to be a "state" within the meaning of that term in the clause forbidding preferences to the ports of one state over those of another. Congress was therefore allowed to exclude Alaska from a provision allowing Canadian rail and water lines to engage in certain coastwise trade generally confined to American vessels. The provision was held not to be a revenue measure, and the clause requiring duties to be "uniform throughout the United States" was therefore not involved.

An echo of an old battle cry was heard in *Heald v. District of Columbia,*[6] in which a resident of the district hurled against a tax

[4] 257 U. S. —, 42 Sup. Ct. 71 (1921)
[5] 258 U. S. —, 42 Sup. Ct. 241 (1922).
[6] 259 U. S. —, 42 Sup. Ct. 434 (1922).

levied by Congress upon the intangible property of inhabitants of the district the ineffective complaint that he was subjected to taxation without representation. Mr. Justice Brandeis pointed out that such an objection goes to the validity of all taxation of residents of the district, whether for local or for general purposes, and answered that "there is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation."[7]

The validity of the Nineteenth Amendment came before the court in *Leser v. Garnett*[8] in a proceeding instituted by a Maryland gentleman to have the names of two Maryland ladies stricken from the voting list. To the objection that the amending power does not extend to an alteration of the Constitution which makes so great an addition to the state electorate as to destroy the autonomy of the state as a political body Mr. Justice Brandeis replied that the Nineteenth Amendment is in character and phraseology precisely similar to the Fifteenth, which has long been recognized as a valid part of the Constitution. To this he added that "the suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, but practically as a war measure which has been validated by acquiescence, cannot be entertained." Alleged violation of state constitutions by some of the ratifying state legislatures was dismissed as immaterial on the ground that "the function of a state legislature in ratifying a proposed amendment to the

[7] The constitutional position of the Indians is treated in Karl J. Knoepfler, "Legal Status of American Indian and his Property," 7 IOWA L. B. 232; Cuthbert W. Pound, "Nationals without a Nation: The New York Tribal Indians," 22 COLUM. L. REV. 97; and a note in 31 YALE L. J. 331 on the jurisdiction of state courts in controversies over Indian lands. Some by-gone issues of national power are considered in Anonymous, "Dred Scott v. John F. A. Sandford," 26 DICKINSON L. REV. 1; and Allen Johnson, "The Constitutionality of the Fugitive Slave Acts," 31 YALE L. J. 161.

[8] 258 U. S. —, 42 Sup. Ct. 217 (1922). See 8 VA. L. REV. 539, and 31 YALE L. J. 754. For discussions prior to the Supreme Court decision, see George Stewart Brown, "Irresponsible Government by Constitutional Amendment," 8 VA. L. REV. 157; G. S. B., "The Nineteenth Amendment," 8 VA. L. REV. 237; and a note in 20 MICH. L. REV. 237. The bearing of the Nineteenth Amendment on the capacity (legal) of women to serve as jurors is considered in 10 GEORGETOWN L. J. (No. 3) 87; 7 IOWA L. B. 190; 20 MICH. L. REV. 669; 6 MINN. L. REV. 78; 70 U. PA. L. REV. 30; 8 VA. L. REV. 139; and 31 YALE L. J. 108.

federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state." Departures by the legislatures of Tennessee and West Virginia from the rules of legislative procedure there generally prevailing were condoned by the affirmation that as the legislatures of those states had power to adopt the resolutions of ratification, official notice to the secretary of state, "duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."[9]

Congressional power under the Eighteenth Amendment to forbid one who prior to the amendment had acquired liquor in a government bonded warehouse to transport it to his home for beverage purposes was affirmed in *Corneli v. Moore*.[10] Objections that such retrospective effect of the amendment took property without due process and took property for public use without just compensation were said to be answered completely by the *National Prohibition Cases*.[11] Most of Mr. Justice McKenna's opinion is devoted to the question whether the Volstead Law forbids the transportation in question. He had a rather hard time in showing the difference between a bonded warehouse and a vault in a safe deposit warehouse from which transportation was allowed in a case decided the preceding term,[12] and Mr. Justice McReynolds, in dissenting on the question of statutory construction, let loose several sharp shafts of sarcasm at the distinctions discovered by his colleague. In the preceding case Mr. Justice McReynolds had thought that the Volstead Law applied, but that such application is unconstitutional. Now he thinks that the court should follow the preceding refusal

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[9] Another effort to have the Nineteenth Amendment declared invalid failed in Fairchild v. Hughes, 258 U. S. —, 42 Sup. Ct. 274 (1922), because the New York citizen who initiated the proceedings prior to the proclamation of ratification was discovered to have no peculiar interest in the matter sufficient to entitle him to assume the rôle of party plaintiff.

[10] 257 U. S. —, 42 Sup. Ct. 176 (1922). See 22 COLUM. L. REV. 480.

[11] 253 U. S. 350, 40 Sup. Ct. 486 (1920); 19 MICH. L. REV. 4 (*sub. nom.* Rhode Island v. Palmer).

[12] Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 Sup. Ct. 31 (1920); 20 MICH. L. REV. 3.

to apply the statute, but he says nothing about the issue of constitutionality.

In *Grogan v. Hiram Walker & Sons*[13] the Eighteenth Amendment and the Volstead Law are construed to prohibit transportation across the country of intoxicating liquors entered from abroad to be forwarded to Canada and also to forbid the trans-shipment of like liquor from one British ship to another in New York harbor. A fervent dissent by Mr. Justice McKenna, joined in by Justices Day and Clarke, denies that such transportation is prohibited by either the amendment or the statute, resting its conclusion in part upon the desirability of reaching a construction consistent with treaty obligations and with other federal legislation. In the majority opinion Mr. Justice Holmes distinguishes the earlier cases referred to in the preceding paragraph by saying that the liquors in the safe deposit warehouse "were in the strictest sense in the possession of the owner * * * and that to move them from the warehouse to the dwelling was no more transportation in the sense of the statute than to take them from the cellar to the dining-room," whereas the liquor in the bonded warehouse was not in the possession of the owner. This suggests the interesting and not wholly academic question whether carriage from cellar to table would be held to be transportation within the amendment. Since "a word is not a crystal," it is not necessary that "transportation" mean the same thing in the Constitution as in a statute.[14]

Section 35 of the Volstead Law declares that upon evidence of illegal manufacture or sale of liquor a tax shall be assessed against, and collected from, the malefactor in double the amount now provided by law, with an additional penalty of $500 on retailers and $1,000 on wholesalers. Under the admonition of this section a zealous collector demanded payment of so-called tax and penalty from a gentleman awaiting trial on the charge of selling liquor unlawfully. At the latter's behest, the supreme court in *Lipke v.*

[13] 259 U. S. —, 42 Sup. Ct. 423 (1922).

[14] What is unlawful removal or transportation of liquor is considered in 10 GEORGETOWN L. J. (No. 1) 78, and 8 VA. L. REV. 460; whether contraband liquor is property or subject to larceny, in 6 MINN. L. REV. 165; 70 U. PA. L. REV. 203; and 31 YALE L. J. 305. In 8 VA. L. REV. 216 is a note on a case forgiving a possessor of liquor which had become intoxicating without his knowledge.

Lederer[15] directed the district court to enjoin the former. Mr. Justice McReynolds pointed out that since evidence of crime is essential to the assessment under the statute, the so-called tax is not a tax but a criminal penalty, and he declared that even for the collection of taxes due process requires that the taxpayer must be given fair opportunity for hearing. To this he added: "And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guaranties of due process of law and trial by jury are not to be forgotten or disregarded." This amounts to saying that Congress might not, if it chose, direct the summary proceeding indulged in by Collector Lederer. Justices Brandeis and Pitney dissented on the propriety of equitable relief, without opinion on the substantive issue in the case.

Another case involving the Eighteenth Amendment related, not to the extent of federal power, but to the effect of the amendment on state power. This is *Vigliotti v. Pennsylvania,*[16] which sustains a conviction for selling liquor without a license under a state statute passed long before the Eighteenth Amendment, the offense being committed subsequent to the amendment. The state statute permitted nothing which the Eighteenth Amendment or the Volstead Law prohibits and in no way conflicted with either. It was therefore held appropriate legislation to enforce the amendment under the concurrent power possessed by the states and Congress, and not precluded by the fact that it was enacted before the amendment or by the fact that Congress had also taken action to enforce the amendment. No question was presented as to the power of Congress and the states to impose separate punishments for the same acts.[17]

Exercises of the war power were involved in two cases in which

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[15] 259 U. S. —, 42 Sup. Ct. 549 (1922).

[16] 258 U. S. —, 42 Sup. Ct. 330 (1922).

[17] The possibility of double punishment by the state and the federal governments is discussed in 21 COLUM. L. REV. 818; 70 U. PA. L. REV. 40; 8 VA. L. REV. 133; and 1 WIS. L. REV. 371. A decision holding unconstitutional a state law permitting possession of intoxicants is noted in 1 WIS. L. REV. 420. The problem of concurrent power is considered in Noel T. Dowling, "Concurrent Power under the Eighteenth Amendment," 6 MINN.

constitutional issues urged were held not to be raised or not supported by the facts. In *Morrisdale Coal Co. v. United States*[18] a vendor of coal at prices fixed by the Fuel Administration sued the government for the additional amount that it would have received had it been free to sell for what purchasers would have paid. It alleged that "a contract on the part of the government must be implied, both from the statute and by virtue of the Fifth Amendment, on the ground that its property was taken for public use." To this Mr. Justice Holmes replied that "if the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker." The government, he said, did not take the property by limiting the price at which it could be sold, "and no lawmaking power promises by implication to make good losses that may be incurred by obedience to its commands."[19]

In *American Smelting and Refining Co. v. United States*[20] a vendor of copper to the government relied on the Fifth Amendment to get as just compensation the price fixed by the Price-fixing Committee of the War Industries Board at the time when deliveries were made instead of the lower price previously fixed when the order for the copper was given. It claimed that it had accepted the order under duress and that therefore the copper was requisitioned, but the court found that it had made a contract with the government and that its right was limited by the price therein agreed upon.[21]

Though the only question technically determined in *Sloan Ship-*

L. REV. 447; C. W. Middlekauff, "The Enforcement of the Liquor Laws," 4 ILL. L. QUART. 107; and a note in 10 CALIF. L. REV. 70.

[18] 259 U. S. —, 42 Sup. Ct. 481 (1922).

[19] In Pine Hill Coal Co. v. United States, 259 U. S. —, 42 Sup. Ct. 482 (1922), a vendor of coal at government-fixed prices contended that the Act of August 10, 1917, contained a promise on the part of the government to guarantee a just return, but the court found that the section thus relied on applied only to sales to the government and not to sales to private purchasers.

[20] 259 U. S. —, 42 Sup. Ct. 420 (1922).

[21] The Lever Act, which had been held void for vagueness in a criminal prosecution (see 19 MICH. L. REV. 9, 402), was also declared void in a civil action in a New York case noted in 31 YALE L. J. 108. The extent of the war powers is considered in Harold M. Bowman, "The Constitution in the War," 2 BOSTON U. L. REV. 22. Issues growing out of the war are discussed

yards Corporation v. United States Shipping Board Emergency Fleet Corporation[22] was one of statutory construction whether Congress had made the defendant in effect an *alter ego* of the government or a private corporation authorized to act as agent of the government, the decision illustrates significant new modes of governmental action whose constitutionality apparently was unquestioned. Under statutory authority the shipping board created the fleet corporation under the laws of the District of Columbia, with capacity to sue and be sued. All the stock was in fact owned by the government, though this was not necessary under the statute. To the original power to purchase, construct and operate ships was later added more extensive authority to exercise functions conferred upon the President and by him delegated either directly to the corporation or to the shipping board, with permission to act through the corporation. The majority of the court, speaking through Mr. Justice Holmes, denied to the corporation immunity from suit even in the courts of the states. In dissenting, Chief Justice Taft suggests that the majority opinion may be confined to the allegations on the pleadings and to acts of the corporation in the earlier stages of its existence before it became the repository of powers derived from the President. His dissent is based on apprehension that the decision goes farther than this and treats the defendant as a private corporation in all respects. He agrees with the majority that the corporation is not entitled to priority in bankruptcy proceedings of its debtors, since he thinks that the United States itself enjoys such priority only in respect to taxes. Justices Van Devanter and Clarke join in the dissent. The exact status of the fleet corporation will not clear until we have more decisions, but the power of the national government to go into business as the sole stockholder of a private corporation is clearly indicated. Thus the United States may emulate the enterprise of North Dakota in its adventures in the realm of state capitalism. The Shipping Act was passed before the entrance of the United

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in Charles Kellogg Burdick, "The Treaty-Making Power and the Control of International Relations," 7 CORNELL L. Q. 34, and Julius Henry Cohen, "The Obligation of the United States to Return Enemy Alien Property," 21 COLUM. L. REV. 666.

[22] 258 U. S. —, 42 Sup. Ct. 386 (1922).

States into the war, but, as Mr. Justice Holmes suggests, "no doubt in contemplation of the possibility of war, to create a naval reserve and a merchant marine." This is the only reference to the constitutional source of the congressional authority thus exercised. Whether such business enterprise might be entered upon by virtue of the commerce power or the postal power, or both combined, without the aid of the war power, are questions that will not be definitely settled by any sanction conferred upon the activities of the fleet corporation. By a later statute of June 5, 1920, the property of the fleet corporation has been transferred to the shipping board, with the result that the payment of judgments obtained against the corporation may be dependent upon the grace or favor of the government.[23]

The long-established power of the national government to deny the use of the mails to persons against whom so-called fraud orders have been issued by the postmaster general after an administrative hearing was reaffirmed in *Leach v. Carlile*[24] over the dissent of Justices Holmes and Brandeis. The former in his dissenting opinion pointed out that other modes of carrying letters are forbidden by

[23] On the general subject involved in the Sloan case, see Eldred E. Jacobsen, "The Status of Government-Owned and Government-Controlled Corporations," 10 GEORGETOWN L. J. (No. 2) 1.

Three cases involving issues raised by proprietary enterprises of the national government may be noted here.

In Marine Ry. & Coal Co. v. United States, 257 U. S. —, 42 Sup. Ct. 32 (1921), the United States was held entitled to possession of land on the Virginia side of the Potomac River which had originally been below low-water mark until filled in by the government. Whether the private owner of the adjoining land inshore had any rights for loss of access to the stream was not involved in the case.

In Jones v. United States, 258 U. S. —, 42 Sup. Ct. 218 (1922), the government was successful in a suit to recover the value of land obtained from it fraudulently by entries in violation of the homestead laws, notwithstanding the fact that the fraud might not have been successful but for a mistake of law attributable to the government. Mr. Justice Pitney did not sit.

The federal Employees' Compensation Act was interpreted in Dahn v. Davis, 258 U. S. —, 42 Sup. Ct. 320 (1922), to make the compensation awarded thereby exclusive and thus to defeat any right of action under the statute making the director general of railroads liable under the Federal Control Act by a railway mail clerk who had previously recovered compensation under the Employees' Compensation Act.

[24] 258 U. S. —, 42 Sup. Ct. 227 (1922). See 22 COLUM. L. REV. 590.

Congress and that even if this should be held unconstitutional, as suggested in an early decision, the postal service is the only feasible way of correspondence for most persons, and that therefore the notion of the earlier cases that the government should be free to withhold a service which it was not obliged to undertake at all is no longer a warrant for action which is in practical effect an infringement of freedom of written communication in violation of the First Amendment. Mr. Justice Clarke for the majority adduced the established rule and found that the case came within it since the postmaster general had acted upon evidence that the plaintiff's advertising was in fact fraudulent in the sense that his product lacked the remarkable invigorating qualities which he claimed for it.[25]

The constitutional question raised in *Ng Fung Ho v. White*[26] was this: "May a resident of the United States who claims to be a citizen be arrested and deported on executive order?" This was answered in the negative in the case of persons already resident who had not entered surreptitiously and who supported their claim to citizenship by evidence sufficient, if believed, to establish it. Such deportation was declared to be obviously a deprivation of liberty, and one that "may result also in loss of both property and life, or of all that makes life worth living," to which was added: "Against the danger of such deprivation without the sanction afforded by judicial proceedings the Fifth Amendment affords protection in its guarantee of due process of law." Thus Mr. Justice Brandeis rested the case squarely on constitutional grounds, although earlier he observed that "jurisdiction in the executive to order deportation exists only if the person arrested is an alien" and "the claim to citizenship is thus a denial of an essential jurisdictional fact," thus apparently declaring that the executive deportation was not war-

[25] For discussions of Milwaukee Publishing Co. v. Burleson, 255 U. S. 407, 41 Sup. Ct. 352 (1921), 19 MICH. L. REV. 6, 504, 505, sustaining administrative exclusion of excessively unpatriotic newspapers from the second-class mailing privilege, see 21 COLUM. L. REV. 715, and 1 WIS. L. REV. 364.

Another exercise of national power is discussed in Charles J. Williamson, "The Rights Conferred by Letters Patent for Inventions," 8 VA. L. REV. 507. The general nature of the federal system is adverted to in Harry St. George Tucker, "The General Welfare," 8 VA. L. REV. 167.

[26] 259 U. S. —, 42 Sup. Ct. 492 (1922).

ranted by statute. The same decision sanctioned executive deportation of two aliens and the opinion referred with apparent approval to an earlier case establishing that, with respect to persons "in legal contemplation without the borders of the United States seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing." We are left in doubt as to the constitutional rights of residents claiming citizenship who have entered surreptitiously and of residents whose claim to citizenship is not supported by a substantial offer of proof.[27]

During the past term the court has shown a disposition to relent somewhat from the rule apparently established two years ago that injuries within the maritime jurisdiction of the federal courts may not be subjected by Congress to the liabilities imposed by state compensation laws.[28] None of the cases explicitly involves the power of Congress, but since they allow state laws to apply they indicate that Congress may expressly sanction state laws which affect only minor details and do not interfere with the supposedly

[27] Questions with regard to aliens are considered in Richard W. Flournoy, Jr., "Naturalization and Expatriation," 31 YALE L. J. 848; notes on the interpretation of the Naturalization Act of 1918 in 10 CALIF. L. REV. 59, and 31 YALE L. J. 206; on state anti-alien land legislation, in 31 YALE L. J. 299; and on the right of a diseased alien wife of a citizen to admission to the United States, in 70 U. PA. L. REV. 314.

Issues with regard to the treaty-making power are presented in J. Whitla Stinson, "Embargoes and Detentions under the Early American Treaties," 16 ILL. L. REV. 174; a note in 10 GEORGETOWN L. J. (No. 3) 91 to Missouri v. Holland, 252 U. S. 416, 40 Sup. Ct. 382 (1920), 19 MICH. L. REV. 11; and a note in 3 LOYOLA L. REV. 51 to Sullivan v. Kidd, 254 U. S. 434, 41 Sup. Ct. 158 (1921), 20 MICH. L. REV. 504.

In Collins v. Loisel, 259 U. S. —, 42 Sup. Ct. 469 (1922), the question was whether certain extradition proceedings were in accordance with a treaty with Great Britain. The treaty required evidence of criminality sufficient under the laws of the place of asylum to justify commitment. This was held to refer only "to the scope of the evidence or its sufficiency to block out those elements essential to conviction," and not to include rules of admissibility. Mr. Brandeis closed his opinion by saying that "no procedural rule of a state could give to the prisoner a right to introduce evidence made irrelevant by a treaty."

[28] Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438 (1920), 19 MICH. L. REV. 13. See E. Merrick Dodd, Jr., "The New Doctrine of the Supremacy of Admiralty over the Common Law," 21 COLUM. L. REV. 647.

desired uniformity of the general maritime law. The question in *Western Fuel Co. v. Garcia*[29] was whether an admiralty court may enforce a state statute giving action for wrongful death. This was answered in the affirmative in the case of a fatal accident to a stevedore at work in the hold of a vessel anchored in San Francisco Bay. Limitation on the scope of the decision is indicated in the statement of Mr. Justice McReynolds that "the subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." Recovery in the particular case was denied, however, because the action was not brought within the period designated by the state statute on which recovery depended.

The court went still further in *Grant Smith-Porter Ship Co. v. Rhode*[30] in holding that the right to recover in the admiralty courts for an injury normally within that jurisdiction is abrogated when the parties have contracted with reference to a state compensation law which prescribes the statutory compensation as the exclusive remedy of the employee. The injury in question was suffered on a ship which was being constructed on navigable waters. The opinion states that the contract for constructing the ship was non-maritime and that neither the general employment nor the particular activities of the injured workman had any direct relation to navigation or commerce. Yet it was recognized that the tort was within the admiralty jurisdiction since this jurisdiction in cases *ex delicto* depends upon locality and the incompleted structure was on navigable waters. The decision excluding the suit from the admiralty court, and in effect sanctioning proceedings under the state compensation law, is predicated on the doctrine of the *Garcia* case that "as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the lat-

[29] 257 U. S. —, 42 Sup. Ct. 89 (1921). The general subject involved in this case is treated in Robert M. Hughes, "Death Actions in Admiralty," 31 YALE L. J. 115.

[30] 257 U. S. —, 42 Sup. Ct. 157 (1922). See 10 CALIF. L. REV. 234; 22 COLUM. L. REV. 368; 35 HARV. L. REV. 743, 762; 20 MICH. L. REV. 535; and 31 YALE L. J. 561. A note on state compensation acts and maritime accidents appears in 70 U. PA. L. REV. 42.

ter might be modified or supplemented by state statutes." We have the assurance of Mr. Justice McReynolds that this conclusion accords with the cases in which state compensation laws were held inapplicable to injuries within the maritime jurisdiction. He puts the distinction as follows:

"In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

Earlier he had said that "as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund, it cannot properly be said that they consciously contracted with each other in contemplation of the general maritime law." From this he concluded that the regulation of the "liabilities of the parties, as between themselves, by a local rule," would not interfere with the proper harmony of the general maritime law. Chief Justice Taft did not sit, and Mr. Justice Clarke confined his concurrence to the result.

If responsibility for the injury in question is not within the admiralty jurisdiction, there is of course no barrier to the application of a state compensation act. Such is the decision in *State Industrial Commission v. Nordenholt Corporation,*[31] in which the state court was reversed for holding the state compensation law inapplicable to a fatal injury suffered by a longshoreman on a dock. The state court had recognized the appropriate general principle, but had declared that an award under the state compensation law is made on the theory, not that a tort has been committed, but that the statute imposing liability is in effect part of the contract of employment, and that therefore the state law is inapplicable to a contract of employment maritime in nature. To this the supreme court replied that liability for accidents on land is not within the admiralty jurisdiction and that therefore no superior maritime law precludes the application of a state statute, whether its awards "are made as upon implied agreements or otherwise."

[31] 259 U. S. —, 42 Sup. Ct. 473 (1922).

In *Carlisle Packing Co. v. Sandanger*,[32] on the other hand, an action for an injury suffered on a motor-boat in navigable waters was declared to be subject to the general rules of maritime law, so that it was error for a state court to apply the common law rules of negligence as a basis of indemnity rather than the maritime rule of unseaworthiness. Since, however, the negligence found by the state court amounted to unseaworthiness under the appropriate maritime law, the error was held not prejudicial and the judgment for the plaintiff was sustained. Mr. Justice Clarke confined his concurrence to the result.[33]

The question whether Congress may restrict the President in removing officers appointed by and with the advice and consent of the Senate has been frequently mooted, but never decided. A decision was again avoided in *Wallace v. United States*[34] by holding that the Senate, by concurring in the appointment of a successor whose appointment was authorized only if there were a vacancy, indicates its concurrence in the removal of the prior incumbent. The removal in question was not in conformity with an act of March 3, 1865, which entitled officers removed by order of the President to a court martial and made the removal void if a court martial is not convened within six months, or if, when convened, it fails to award dismissal or death as punishment of the officer thus on trial. Colonel Wallace applied for a court martial and it was denied him. The statute of 1865 applied only if the removal was by the President alone and thus was put to one side by the holding that the Senate concurred in the removal by the appointment of the successor, which filled the quota. In the first opinion in the case Chief Justice Taft proceeds on the assumption that in the absence of any showing to the contrary the Senate in confirming the successor was advised that the vacancy was created by the dismissal of the prior incumbent, even though the nomination did not state that fact. In denying a rehearing in *Wallace v. United States*,[35] a suggestion that it was conceded that the Senate made

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[32] 259 U. S. —, 42 Sup. Ct. 475 (1922).

[33] The relation of the common law to maritime torts is discussed in 7 CORNELL L. Q. 86; 6 MINN. L. REV. 230, 238; and 31 YALE L. J. 107.

[34] 258 U. S. —, 42 Sup. Ct. 221 (1922).

[35] 258 U. S. —, 42 Sup. Ct. 318 (1922).

no inquiry into the matter and knew nothing about it was dismissed by saying that "the Senate in confirming appointments is not exercising a judicial but a legislative function," and "if it chooses to accept the President's nomination as assurance that there is a vacancy to which the appointment proposed can be made, and acts on that assurance, the legal effect of the confirmation is not affected."[36]

Another officer removed from the army as a result of the finding of a military tribunal, the so-called "Honest and Faithful Board," that his classification in the group of those who would not be missed was based on conditions due to his "neglect, misconduct or avoidable habits," complained unsuccessfully, in *Creary v. Weeks*,[37] that the absence of a hearing before this tribunal rendered the proceedings wanting in due process of law. There had been a hearing previously before another board, the so-called "Final Classification Board," on the question whether the classification for withdrawal from active service should stand, but no hearing before the "Honest and Faithful Board," which determined whether the superfluous officer should be retained on the retired list with pay as the victim of misfortune or should be discharged without pay as the victim of his own folly. While Mr. Justice Day indicates that this earlier hearing satisfied all demands of fairness, he quotes an earlier opinion to the effect that "to those in the military service of the United States the military law is due process," and he disposes of the controversy by affirming that so long as the military tribunal has jurisdiction and acts in accordance with the procedure provided by statute the civil tribunals are without jurisdiction to interfere by mandamus.[38]

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[36] Other questions relating to national officers are discussed in Urban A. Lavery, "Presidential 'Inability,'" A. B. A JOUR 13, and Dudley O. McGovney, "Ineligibility of a United States Senator or Representative to other Federal Offices," 7 IOWA L. B. 152. National power over expenditures in senatorial primaries is considered in notes in 22 COLUM. L. REV. 54, and 31 YALE L. J. 90, on Newberry v. United States, 256 U. S. —, 41 Sup. Ct. 469 (1921), 20 MICH. L. REV. 12.

[37] 259 U. S. —, 42 Sup. Ct. 509 (1922).

[38] French v. Weeks, 259 U. S. —, 42 Sup. Ct. 505 (1922), deals with the construction of the Army Reorganization Act in the case of a colonel designated for retirement for disabilities not due to his own neglect, misconduct or avoidable habits. It was held that the statute does not require the per-

Removals by heads of departments of officers appointed by them were sustained in two cases. In *Eberlein v. United States*[39] a customs officer removed by the secretary of the treasury after a hearing was held not entitled to salary from the date of such removal to that of his subsequent reappointment, even though the reappointment was due to a later finding that the prior removal was unwarranted by the facts. Mr. Justice Day observed that "the power of appointment and removal was in the secretary of the treasury," that "it was within the power of Congress to confer this authority on the secretary," and that since the removal complied with the statutory requirements as to procedure the action of the executive officers is not subject to revision in the courts.

In *Norris v. United States*[40] the removal was wrongful because made without the hearing required by statute. The officer had been reinstated and given a chance to be heard. At the hearing it was decided that his removal was unwarranted. Immediately thereafter the office was abolished. Mr. Justice Day declared that "the power of the secretary of the treasury to determine the number of inspectors to be employed cannot be reasonably questioned," nor "can the power of removal be doubted," since "it is included in the power to appoint; the statute not otherwise providing." The officer, therefore, was held not entitled to compensation after his office was abolished. His claim to compensation from the time of his wrongful removal without a hearing to the time of his reinstatement was denied on the ground that he had by his failure for ten months to request a hearing been guilty of laches, which justified the assumption that he had abandoned his title to the office.[41]

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sonal approval of the President of the findings of the Final Classification Board, but that the President may act through the secretary of war.

In Kern River Co. v. United States, 257 U. S. —, 42 Sup. Ct. 60 (1921), the attorney general was held to have authority with respect to litigation regarding public lands, though Congress had not directed that suit be brought. Alabama & V. Ry. Co. v. Journey, 257 U. S. —, 42 Sup. Ct. 6 (1921), found that the director general of railroads had not exceeded his powers in prescribing the venue of suits against the railroads under federal control.

[39] 257 U. S. —, 42 Sup. Ct. 12 (1921).

[40] 257 U. S. —, 42 Sup. Ct. 9 (1921).

[41] A similar abandonment was found in Nicholas v. United States, 257 U. S. —, 42 Sup. Ct. 7 (1921), in which a customs inspector removed without the hearing required by statute took no steps to question his dismissal until three years later, when suit for salary was brought.